APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 29, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of October, two thousand and three.

PRESENT:

RALPH K. WINTER
JOSÉ A. CABRANES
*Circuit Judges.**

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* Judge Sack, originally a member of the panel, recused himself prior to oral argument and did not participate in this decision. The appeal is being disposed of by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. 0.14; *Murray v. Nat'l Broad. Co., Inc.*, 35 F.3d 45 (2d Cir. 1994).

Appendix A

No. 03-7092

LOUIS R. NAPOLI,

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from a judgment by the United States District Court for the Southern District of New York (John S. Martin, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is **VACATED** and **REMANDED** for further proceedings consistent with this order.

After suffering a heart attack in November 1996 at age 55, plaintiff Louis R. Napoli received monthly disability benefits from First Unum Life Insurance Company, under a long-term disability policy issued to his employer, on the basis that "because of injury or sickness [Napoli] cannot perform each of the material duties of his regular occupation [as a government securities bond broker]," *i.e.*, that Napoli was "disabled" as defined by the First Unum policy and consequently qualified for benefits. Seven months later, however, First Unum determined that Napoli was not

"disabled" and terminated his benefits. Napoli appealed the termination of benefits to First Unum's Quality Review Section, which rendered a ruling adverse to Napoli.

In terminating Napoli's benefits, First Unum relied, in part, on the opinion of Dr. Richard W. Nesto, who reviewed Napoli's medical records upon First Unum's request. Dr. Nesto concluded that Napoli "could physically perform sedentary to light occupation," that "it appears reasonable . . . for [Napoli] to return to work as a stockbroker on this basis," and that "[a]lthough the relative risk of a 'triggered' cardiac event is higher when exposed to stress, the *absolute* risk of an acute cardiac event in a daily basis is so small it is not quantifiable." Dr. Nesto also concluded that Napoli "should be able to return even to a perceived stressful occupation without restriction on a cardiac basis."

The administrative record also included a contrary opinion by Dr. Aaron Freilich, Napoli's treating cardiologist. While Dr. Freilich "did not necessarily disagree" with Dr. Nesto's assessment, he stated that Napoli "could return to a less stressful occupation but it is [Dr. Freilich's] opinion that he should not return to his prior stress occupation."

After receiving the adverse administrative ruling, Napoli commenced this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against First Unum on February 23, 1999, and on October 31, 2000, he filed an amended complaint for reasons not germane to this appeal. Napoli sought declaratory judgment that he is disabled within the meaning of the policy, reinstatement of his benefits, payment of all benefits in arrears, and costs and fees applicable under ERISA.

Appendix A

On January 15, 2002, First Unum filed a "Motion for Judgment on the Administrative Record," to which First Unum attached a copy of the administrative record. In opposition to First Unum's motion, Napoli cross-moved for discovery, a jury trial, and supplementation of the record, and, to that end, he proffered several exhibits for admission.

By opinion and order dated January 16, 2003, the District Court, treating First Unum's motion as one for summary judgment, granted summary judgment in favor of First Unum and, other than supplementing the record with an affidavit of Dr. Freilich, denied Napoli's motion. In its review of the evidence, the Court described Napoli's claim as "a close case" but determined that Napoli's heart condition "did not render him permanently disabled to act as a bond broker." The Court thus concluded that First Unum "properly determined that [Napoli] was not permanently disabled."

This timely appeal followed. On appeal, Napoli challenges the District Court's resolution of his claim by summary judgment, contending that there were genuine issues of Material fact as to whether Napoli was disabled under the terms of the First Unum policy and that the District Court made impermissible credibility determinations at the summary judgment stage. Napoli also contends that the District Court: (1) abused its discretion in failing to admit certain evidence proffered by Napoli; and (2) improperly denied Napoli's motion for a trial by jury.

We review the legal conclusions of the District Court *de novo* and, in turn, review the underlying administrative decision *de novo*. *See Firestone Tire & Rubber Co. v. Bruch,*

489 U.S. 101, 114 (1989); *Masella v. Blue Cross & Blue Shield,* 936 F.2d 98, 102 (2d Cir. 1991). But our review of the administrative decision, like that of the District Court, is "limited to the record in front of the claim administrator unless the . . . court finds good cause to consider additional evidence." *DeFelice v. American Int'l Life Assur. Co.,* 112 F.3d 61, 67 (2d Cir. 1997); *id.* (describing the court's role in reviewing an ERISA claim determination as a "limited *de novo* review").

Turning to Napoli's challenge to the District Court's grant of summary judgment in favor of First Unum, we note that, although First Unum styled its motion as one for "Judgment on the Administrative Record," we are bound by the District Court's treatment of that motion as one for summary judgment. Accordingly, we recall the familiar standard governing summary judgment motions: Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The issue presented by Napoli's suit is the propriety of First Unum's conclusion that Napoli is not "disabled" as defined by the policy. In addressing that issue, the District Court considered the opinions of two doctors—Dr. Freilich and Dr. Nesto—that were documented in the administrative record. Their reports reveal different opinions concerning Napoli's ability to "perform the material duties of his regular occupation." Significantly, Dr. Nesto concluded that Napoli

could return to work as a government securities bond broker without endangering his health, and Dr. Freilich concluded that Napoli could not.

In granting summary judgment, the District Court essentially adopted the opinion of Dr. Nesto over that of Dr. Freilich. Although the Court stated that "[t]here is no substantial difference of opinion between Dr. Freilich and Dr. Nesto," the Court could only reach that conclusion by discrediting Dr. Freilich's opinion that Napoli "should not return to his prior stress occupation." Such a credibility determination is appropriate at a trial, but it exceeds the scope of a judge's authority in considering a summary judgment motion. Absent any indication that Dr. Freilich's opinion is unreliable as a matter of law, the differing opinions of the two doctors present a genuine issue as to the material fact of Napoli's medical condition. Accordingly, because genuine issues of material fact exist in this case and its resolution depends in part, on credibility determinations, the District Court improperly granted summary judgment to First Unum. We thus vacate the District Court's judgment and remand the cause for a trial, in which the trier of fact is free to decide issues of material fact and make credibility determinations under a "limited *de novo* review" of the administrative decision.

While declining to comment on the future resolution of this case, we note that the trier of fact may decline to consider any evidence that has not already been considered and may ultimately reach the same result as the result of the judgment currently on appeal. Notwithstanding this possibility, remand is necessary because, as noted above, summary judgment is an inappropriate resolution of this case.

As to Napoli's two other grounds for appeal, we find neither to be of merit. "[T]he decision whether to admit additional evidence is one which is discretionary with the district court, but which discretion ought not be exercised in the absence of good cause." *DeFelice,* 112 F.3d at 66. Having reviewed the evidence at issue and considered the parties' arguments, we hold that the District Court did not abuse its discretion in limiting its review to the administrative record and Dr. Freilich's affidavit. And Napoli's suit is not entitled to a jury trial. *See Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1258-59 (2d Cir. 1996); *DeFelice,* 112 F.3d at 64-65. On remand, the District Court is obligated, as it has already acknowledged, to conduct a nonjury *de novo* review of First Unum's determination.

* * *

We hereby VACATE the judgment of the District Court and REMAND the cause for further proceedings consistent with this order.

FOR THE COURT
Roseann B. MacKechnie, Clerk of Court

by: s/ Lucille Carr

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 13, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 1329 (JSM)

NAPOLI,

Plaintiff

-v.-

FIRST UNUM LIFE INS. CO.,

Defendants.

JUDGE JOHN S. MARTIN, Jr., District Judge:

Plaintiff Louis R. Napoli, a bond trader, has not worked since November 29, 1996, when he suffered a heart attack at work and had emergency by-pass surgery. After a period in which he received payments from the Defendant under a disability insurance contract, Defendant notified Plaintiff that they were terminating his benefits because it had determined that he was not permanently disabled. Plaintiff then commenced this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, seeking to compel Defendant to continue paying him under his disability contract. Defendant now moves for summary judgment on the ground that the administrative

record supports its determination that Plaintiff is not permanently disabled. Plaintiff has cross-moved to supplement the record and for a jury trial. Plaintiff's motion for a jury trial is denied, but its motion to supplement the record is granted in part. Having reviewed the record as supplemented, the Defendant's motion for summary judgment is granted.

In an action such as this, to review the denial of benefits under ERISA, the Court is to conduct a nonjury de novo review of the plan administrator's determination. *DeFelice v. American Int'l Life Assurance Co. of New York,* 112 F.3d 61, 64 (2d Cir. 1997). Plaintiff is not entitled to a jury trial. *Id.*, at 64; *Tischmann v. ITT/Sheraton Corp.,* 145 F.3d 561, 568 (2d Cir.), cert. denied, 119 S. Ct. 406 (1998); *Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1258 (2d Cir. 1996).

Where the administrator is also the party who will pay the benefits, the court has the discretion to admit additional evidence that was not part of the record before the administrator. *DeFelice, supra,* 112 F.3d at 65. In this case, Plaintiff seeks to conduct discovery and to have a trial at which he can offer additional evidence.

Having examined the record, the Court, in the exercise of its discretion, denies the application for discovery and for a trial for the taking of additional testimony. However, the Court will consider the affidavit of Dr. Frelich for the additional information it contains concerning Plaintiff's condition.

Appendix B

DISCUSSION

The insurance policy at issue here provides:

> Disability and disabled mean that because of injury or sickness you cannot perform each of the material duties of your regular occupation.

There is no question that Plaintiff has the physical ability to perform each of the material duties of his regular occupation. The issue is what degree of risk of future damage to one's health will render one totally disabled to perform his or her regular occupation. Plaintiff contends that he is disabled because there is some risk that, if he returns to work, the stress of his work may cause another serious heart attack. While not denying that Plaintiff may face some risk of future heart problems, if he returns to work, Defendant contends that the risk is so insubstantial that it does not preclude Plaintiff from returning to work.

In the Affidavit submitted by Plaintiff, Dr. Frelich states: "Mr. Napoli's Coronary Artery Disease is not curable, is a permanent condition and the avoidance of excessive stress from his occupation as a government bond broker could prevent a further heart attack." The affidavit also states: "the extreme stress of Mr. Napoli's occupation could progress his Coronary Artery Disease and could again exacerbate his heart condition, causing another heart attack."

For its part, Defendant notes that after Dr. Frelich was contacted by a physician employed by the Defendant in

August, 1997, while the claim was under review, he signed as accurate a memo memorializing his conversation, which stated:

> You believe that Mr. Napoli should not engage in any activity that produces stress—be it work or arguing with his wife. For that reason, you and he decided that he should not return to work. Medically, he could tolerate this, and if he wanted to return to work, you would not suggest otherwise.

Defendant also relies on an opinion it obtained from Dr. Richard Nesto, a cardiologist who was an Associate Professor of Medicine at Harvard Medical School. Dr. Nesto's report noted, among other things, that Mr. Napoli had performed well on his stress test and concluded that "he is in an excellent prognostic category and in usual circumstances would be able to return to fully employment. . . ." Dr. Nesto was of the opinion that it was unlikely that stress on the job contributed to the development of Plaintiff's atherosclerosis. Dr. Nesto stated that in his opinion:

> Although the relative risk of a "triggered" cardiac event is higher when exposed to stress, the *absolute* risk of an acute cardiac event in [sic] a daily basis is so small it is not quantifiable.

The question before the court comes down to whether a party should be considered totally disabled if there is even the slightest risk that the stress of his work might cause

another heart attack. The principles to be applied in answering this question were set forth in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F. Supp. 2d 619, 628 (D.N.J. 2001):

> It is a basic tenet of insurance law that an insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health. *See Stark v. Weinberger,* 497 F.2d 1092, 1098-99 (7th Cir. 1974); *Oppenheim v. Finch,* 495 F.2d 396, 398 (4th Cir. 1974); *Stillwell v. Sullivan,* 1992 WL 401971, *6 (D.Kan. Dec. 30, 1992). As noted in the Applemans' treatise, "The insured is considered to be . . . disabled where it is impossible for him to work without hazarding his health or risking his life." 1C Appleman, *Insurance Law & Practice* § 651 at 241 (1981). In fact, this proposition is sufficiently well-settled that in many jurisdictions it travels under the name of the "common care and prudence rule." E.L. Kellett, Annotation, *Continuation of Work as Affecting Finding of Total or Permanent Disability within Insurance Coverage,* 24 A.L.R.3d 8, § 3(a) (1969); *see, e.g., McGowan v. Orleans Furniture Inc.,* 586 So.2d 163, 166 (Miss. 1991); *John Hancock Mut. Life Ins. Co. v. Poss,* 154 Ga. App. 272, 267 S.W.2d 877, 880 (1980).
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> Insureds with heart conditions or who have experienced heart attacks provide an obvious context for the application of these principles. E.L. Kellett, Annotation, *Heart or Vascular Condition*

> *as Constituting Total or Permanent Disability within Insurance Coverage*, 21 A.L.R. 3d 1383, § 3 (1968). Where medical prudence requires a cessation of work activity, the insured is disabled. . . .

However, the courts attempting to determine whether someone who has had a serious heart attack and by-pass surgery is totally disabled have reached different results. *Compare Pompe v. Cont'l Casualty Co.*, 119 F. Supp. 2d 1004 (W.D. Mo. 2000); *Buffaloe v. Reliance Standard Life Ins. Co.*, No. 99 Civ. 710, 2000 WL 33951195 (E.D.N.C. 2000) *with Rosenthal v. First Unum Life Ins. Co.*, No. 00 Civ. 3204, 2002 WL 975627 (S.D.N.Y. 2002); *Mihok v. Magnetek, Inc.*, No. 10 CV 2446, 2002 WL 1162843 (C.D. Cal. 2002). These apparently inconsistent results may be attributable to the different factual situations rather than a disagreement as to the governing legal principles.

Obviously, every case must be judged on its particular facts. While this is a close case, it is reasonable to conclude that the Plaintiff's heart condition did not render him permanently disabled to act as a bond broker.

There is no substantial difference of opinion between Dr. Frelich and Dr. Nesto. Both of them agree that returning to work would pose some risk for Plaintiff. While Dr. Nesto says the risk is "so small it is not quantifiable," Dr. Frelich does not quantify the risk but says only that Plaintiff's return to work "could" trigger a heart attack.

Appendix B

It does not appear that most people today who have suffered heart problems similar to Plaintiff would consider themselves disabled. The Court can take judicial notice of the fact that although the Vice-President of the United States has had serious heart problems, he has not considered the risk of his high stress job as rendering him disabled. Similarly, all of us know people active in high stress professions, including judges, who have had coronary by-pass surgery similar to Plaintiff's.

Since many with conditions as serious as Plaintiff's continue in high stress occupations, how is the Court to draw the line between those who are permanently disabled and those who are not? Perhaps a practical way to answer the question is to ask: Is it likely that the person would have returned to work, even if he did not have disability insurance or other substantial assets? Here, the evidence in the record supports the conclusion that Plaintiff would have returned to his normal occupation if he needed that income to support himself and his family. As noted above, Dr. Frelich told one of the Defendant's doctors that he would not have opposed Plaintiff returning to work if that is what he wanted to do. In addition, Dr. Nesto's opinion that there was such a slight risk of future problems that it was unquantifiable, supports the conclusion that one who depended on the income from his work would not be deterred from going back to work by the risk that Plaintiff faced. Thus, on this record the Court concludes that the Defendant properly determined that Plaintiff was not permanently disabled.

For the foregoing reasons, the Defendant's Motion for Summary Judgment is granted and the Complaint is dismissed.

Appendix B

SO ORDERED.

Dated: New York, New York
January 13, 2003

s/ John S. Martin
JOHN S. MARTIN, JR., U.S.D.J.